

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: Case No. 10-14731-scc  
Chapter 11  
2626 BROADWAY, LLC,  
Debtor. One Bowling Green  
New York, New York 10004  
Tuesday, November 9, 2010  
10:33 a.m.

TRANSCRIPT OF INITIAL CASE CONFERENCE and MOTION OF BROADWAY  
METRO ASSOCIATES, L.P. FOR AN ORDER (A) GRANTING RELIEF FROM  
THE AUTOMATIC STAY OR IN THE ALTERNATIVE (B) DISMISSING THIS  
CHAPTER 11 CASE BEFORE THE HONORABLE SHELLEY C. CHAPMAN  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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1 (Time Noted: 10:33 a.m.)

2 THE COURT: All right, shall we have appearances?

3 MS. DALEY: Yes, Your Honor. M. Teresa Daley from  
4 M. Teresa Daley Law Offices, P.C., for the Movant, Broadway  
5 Metro.

6 MS. LAWRENCE: Andrea Lawrence from M. Teresa  
7 Daley Law Offices, for the Movant, Broadway Metro.

8 MR. LEINWAND: Good morning, Your Honor. Robert  
9 Leinwand and Robert Sasloff from Robinson Brog, counsel for  
10 the Debtor, 2626 Broadway, LLC.

11 MR. KHODOROVSKY: Good morning, Your Honor, Nazar  
12 Khodorovsky for the U.S. Trustee. Thank you, Your Honor.

13 THE COURT: All right. Okay, tell me what we're  
14 doing today.

15 MS. DALEY: Well, first of all, I think we might  
16 have a little bit of housekeeping. The last time we were  
17 here, Your Honor, there was an issue that was raised with  
18 regard to service of the motion.

19 After we left Court that day, we did, in fact,  
20 send out copies to, I believe, everyone that was on the  
21 creditors' list, and the affidavits of service with regard to  
22 that were electronically filed.

23 THE COURT: Okay.

24 MS. DALEY: So, I think that that issue may have  
25 been disposed of.

1 THE COURT: Okay.

2 MS. DALEY: Secondly, Your Honor, the Debtor was  
3 required to, on November 2, 2010, to have paid post-Petition  
4 use and occupancy and the Debtor --

5 THE COURT: Did not happen.

6 MS. DALEY: Did not happen, Judge.

7 THE COURT: All right, so before we start  
8 galloping off, my question for the Debtor is what are we  
9 doing? The rent wasn't paid. Why are we here today with all  
10 these people having a hearing?

11 MR. LEINWAND: I don't really understand why we're  
12 here today, Your Honor. The last hearing, Your Honor made  
13 clear that the price of admission with respect of the  
14 Debtor's continued entry into this Court as well as their  
15 remaining in the premises was the payment of the use and  
16 occupation post-Petition.

17 THE COURT: Right.

18 MR. LEINWAND: And Your Honor was very gracious in  
19 indicating that she wasn't going to turn this other into an  
20 issue and was going to in fact allow the Debtor to pay in or  
21 about November --

22 THE COURT: November 2nd.

23 MR. LEINWAND: The Debtor did not have the funds  
24 to pay that and did not pay that money.

25 THE COURT: Right.

1 MR. LEINWAND: Your Honor, there was a letter to  
2 the Court by Ms. Daley's firm dated November 8th indicating  
3 that since the money was not paid that they believe they were  
4 entitled to relief from the automatic stay. We agree with  
5 that belief. We believe that the motion seeks relief from  
6 the automatic stay or in the alternative dismissal of the  
7 case. The Debtor is prepared to consent to a vacator of the  
8 automatic stay to permit the landlord to take whatever action  
9 the landlord chooses.

10 With that being said, I would have thought that it  
11 would not be necessary to have an evidentiary hearing before  
12 Your Honor.

13 THE COURT: Okay, well maybe this is my fault. Is  
14 this my fault?

15 MS. DALEY: No, Judge, it's not.

16 THE COURT: Okay, I'm just -- I'm a little  
17 astonished so --

18 MS. DALEY: The other portion of the application  
19 was to dismiss this case --

20 THE COURT: Right.

21 MS. DALEY: -- based upon our position that it was  
22 a bad faith action.

23 THE COURT: But why do we need to go there if he's  
24 willing to lift the stay?

25 MS. DALEY: Because I think it's very gracious of

1 him, however, if we lift the stay, I go back to State Court,  
2 a warrant gets issued, they go in on an order to show cause  
3 and they continue to drag this thing out *ad infinitum*. I had  
4 suggested to counsel --

5 THE COURT: Wait, I'm not following you. My  
6 concept of lifting the stay is that he's completely out of  
7 the premises.

8 MS. DALEY: He won't give over the keys. I asked  
9 for the keys.

10 THE COURT: Are you serious?

11 MR. LEINWAND: Your Honor, my client's position is  
12 simply that and I believe that the modification of the stay  
13 is simply that the Debtor can -- I'm sorry, the landlord can  
14 proceed with the summary proceedings that the landlord  
15 requires and that was -- much of that was done pre-Petition  
16 and simply accomplished the eviction of the Debtor as  
17 expeditiously as possible.

18 THE COURT: It's not going to happen. It's not  
19 going to happen that way. Either you're going to lift it --  
20 you agree to lift the stay and by that I mean totally the  
21 stay is lifted, the stay is gone, turn over the keys, it's  
22 over, or we'll go to trial on the bad faith filing. I'm not  
23 going to countenance that. If that's what your client  
24 thought was going to happen, that's not going to happen.

25 MR. LEINWAND: I hear you, Your Honor. Could I

1 have one or two minutes just to speak to my client?

2 THE COURT: Absolutely.

3 MR. LEINWAND: Thank you, Your Honor.

4 (Brief recess from 10:47 to 11:21 a.m.)

5 THE COURT: Okay, where are we, folks?

6 MR. LEINWAND: Thank you for your time, Your  
7 Honor. We attempted to do discussions, apparently  
8 unfortunately, what I perceive as due to a long history  
9 between the parties and lack of trust, et cetera, et cetera,  
10 et cetera, we were unable to arrive at any resolution.

11 I have spoken to the client with respect to what  
12 Your Honor indicated. The client's position is that what was  
13 sought was a modification of the automatic stay. He would  
14 consent to a modification of the automatic stay to permit the  
15 landlord to take whatever actions the landlord deemed  
16 necessary in State Court to regain possession of the  
17 premises.

18 It's my understanding that right up until the end  
19 of that process with the modification of the stay, they can  
20 take whatever action, but my client is not willing at this  
21 point in time to give up any of his State Court rights with  
22 respect of relinquishing whatever possession he has of the  
23 premises.

24 THE COURT: And he thinks that he's entitled to  
25 the stay? He's not here anymore?

1 MR. LEINWAND: He's just in the bathroom.

2 THE COURT: Okay, and he believes he's entitled to  
3 remain in possession of the premises and not pay rent?

4 MR. LEINWAND: No. No, he believes that he's  
5 entitled to whatever State Court remedies he would be  
6 entitled to at that point in time. He believes that -- you  
7 know, again, I explained to him the requirements and mandates  
8 of the Bankruptcy Code. He understands the requirements and  
9 mandates of the Bankruptcy Code, was not able to comply with  
10 those and, accordingly, because of that, has authorized us to  
11 consent to the modification of the stay.

12 What he doesn't understand is how this Court has  
13 the authority to take away his State Court rights when, in  
14 fact, all that was requested by the landlord was a  
15 modification of the stay with authority to return to the  
16 State Court to --

17 THE COURT: Well, let's talk about that because if  
18 he's questioning my authority, then I have a lot of questions  
19 for him as well.

20 This Court is not a place where you come to engage  
21 in a game of "gotcha." Can I be any more clear than that?

22 MR. LEINWAND: No, Your Honor, you've been clear  
23 throughout. I believe that the client's position is simply  
24 that the case is, in fact, a case where you have a tenant and  
25 a landlord, but it goes further than that.

1 THE COURT: But you have a tenant and a landlord  
2 who have a history of a dispute. Your client believes, or at  
3 least it says it believes, that the landlord wrongfully  
4 interfered with the Urban Outfitters deal.

5 MR. LEINWAND: That's correct.

6 THE COURT: That's his position, okay? That's a  
7 State Court issue as well.

8 MR. LEINWAND: That's correct.

9 THE COURT: Okay, in the absence of any showing --  
10 and if we're going to have to go through this, we'll go  
11 through it -- in the absence of any showing that there are  
12 real creditors here, that there's probability of  
13 reorganization, that there are any other assets here, I'm not  
14 -- this case is going to be dismissed.

15 And unfortunately, Ms. Daley, you're going to have  
16 to go continue to chase him. But your client is not going to  
17 use my Court as an instrument or as part of a plan to  
18 continue to fight with his landlord. It's just not going to  
19 happen.

20 MR. LEINWAND: We believe, Your Honor, that the  
21 case was, in fact, filed with the intention to reorganize.  
22 It was filed in good faith. We do not believe the case  
23 should be dismissed. I understand Your Honor's position.

24 THE COURT: What's the answer to the question of  
25 why the Debtor can remain in Chapter 11 without paying rent

1 and remain in the premises?

2 MR. LEINWAND: It cannot --

3 THE COURT: Educate me. I'm giving you a hard  
4 time.

5 MR. LEINWAND: No, Your Honor, and you should. I  
6 understand. I don't want to educate you. I can proffer to  
7 you my position, my understanding of the Bankruptcy Code.

8 My understanding of the Bankruptcy Code is simply  
9 that an obligation under 363 to pay the rent and additional  
10 rent pursuant to the lease is an absolute obligation. The  
11 failure to do that would, in fact, result in a deemed  
12 rejection of the lease pursuant to 365.

13 The deemed rejection of the lease would require  
14 the landlord [sic] to vacate possession of the premises. If  
15 the landlord [sic] does not vacate possession of the  
16 premises, then -- I'm sorry, the tenant does not vacate  
17 possession of the premises, then the landlord has the right  
18 to proceed in State Court and exercise all of its State  
19 Courts.

20 I do not know, when you have a rejection, it is  
21 not a termination; it is simply putting back the fact that  
22 the Debtor no longer has the obligation to pay the rent  
23 reserved under the lease and the lease is deemed rejected.  
24 The tenant has no rights with respect to that lease, cannot  
25 assign that lease, but still retains possession until that

1 possession is removed by the appropriate State Court  
2 remedies.

3 And that's my understanding and it is not at all  
4 an attack upon Your Honor's competence or jurisdiction. It  
5 is simply what we believe is what Congress enacted in the  
6 Bankruptcy Code.

7 And that, when the landlord requested in its  
8 motion for a modification of the automatic stay, that is what  
9 it requested and we are consenting to that modification, and  
10 that modification gives the landlord all of its rights  
11 without any stay provisions of 362 or otherwise of the  
12 Bankruptcy Code to proceed and exercise all of its rights in  
13 the State Court. And Your Honor --

14 THE COURT: All right, are we going to go to trial  
15 now on the issue of bad faith filing? Is that what we're  
16 going to do next?

17 MR. LEINWAND: We believe, Your Honor, that when a  
18 landlord makes a motion in the alternative for relief from  
19 the stay, or alternatively dismissal, and is granted the  
20 relief that it has requested in the motion, it would not be  
21 necessary to go beyond that for a dismissal.

22 If, however, this Court deems it appropriate under  
23 the circumstances to hear the application in the alternative  
24 for a dismissal, we are prepared to do that. We think that  
25 the only issue that is raised is whether or not this step --

1 THE COURT: How can the landlord pursue State  
2 Court remedies if the tenant remains -- if the Debtor remains  
3 in Chapter 11?

4 MR. LEINWAND: How can it pursue State Court  
5 remedies? The State Court remedies that the landlord wishes  
6 to proceed in is simply to regain possession of the premises  
7 so that it can proceed to do whatever it wants with the  
8 premises unfettered by the Debtor.

9 If Your Honor were to grant a modification of the  
10 automatic stay with respect to the property and with respect  
11 of the landlord's continued quest to retain possession, then  
12 the landlord can do that unfettered by the Debtor's existence  
13 in Chapter 11.

14 What we will proffer, if Your Honor wishes to have  
15 a hearing on the dismissal, is simply that we believe that  
16 this case should not be dismissed, that the Debtor has assets  
17 to proceed, that the Debtor had the intent to reorganize and  
18 that the Debtor has a possibility in prospect of a successful  
19 reorganization.

20 And we believe that if there were a cutting away  
21 all the pre-Petition acts and cutting away all of the  
22 arguments that will be proffered by Ms. Daley and her firm,  
23 we believe that this case should continue in a Chapter 11,  
24 even were the Debtor not in possession of the premises.

25 And we also believe that the fact that the Debtor

1 is in bankruptcy does not, in any way, impair the landlord's  
2 right to regain possession of the premises, which is what the  
3 landlord wished to do in this case.

4 THE COURT: All right, let me hear from Ms. Daley.

5 MS. DALEY: First of all, Your Honor, with respect  
6 to the motion to vacate the stay, while counsel may be  
7 correct that once the stay is vacated we can go back to State  
8 Court, that does not preclude this Court from under -- within  
9 its power, jurisdiction, and authority to direct the Debtor  
10 here to turn keys over. This Court does have that power and  
11 regardless of whether or not it does vacate the stay.

12 Why? Because it has violated an order of this  
13 Court directing it to make payment by November 2nd which it  
14 failed to do and also there have been no operating statements  
15 submitted. The schedules that have been submitted have  
16 creditors listed with amounts that are overstated/

17 THE COURT: Why doesn't that just go to my ability  
18 to dismiss the case?

19 MS. DALEY: Well, it goes to your ability to  
20 dismiss the case, but you can also take into consideration  
21 when you're looking to grant other relief to Movant which the  
22 Movant has requested that this Court do.

23 This Court can direct the U.S. Marshal to deliver  
24 possession in conjunction with the Civil Court judgment that  
25 was entered granting possession to the landlord. We don't

1 have to go back to State Court if this Court chooses to  
2 direct the U.S. Marshal to enforce that judgment, which this  
3 Court can do.

4 This Court can also fashion relief in whatever  
5 fashion it deems necessary in order to make certain that all  
6 of the rights of the parties are adequately protected. And,  
7 in this particular case, Your Honor, we have a situation not  
8 only with the building -- we didn't start a State Court civil  
9 proceeding for the recovery of rent. We started the  
10 proceeding as a holdover based upon the termination of the  
11 lease agreement.

12 THE COURT: What was the dismissal on that? For  
13 lack of personal jurisdiction? I think that was what was  
14 alleged in the papers. What happened to the holdover  
15 proceeding?

16 MS. DALEY: There was two holdovers. See, back in  
17 2008, the Debtor had entered into a contract to purchase the  
18 building under certain provisions contained in the lease  
19 agreement. The Debtor failed to close on that contract. In  
20 the interim period, the Debtor also failed to pay rent. Then  
21 the Debtor also defaulted because they didn't do certain  
22 things; they permitted certain violations to be placed upon  
23 the building by the Department of Buildings and the  
24 Environmental Protection Agency, and they didn't cure that.

25 They didn't -- he didn't maintain -- I'm sorry,

1 not he, the Debtor did not maintain the appropriate insurance  
2 as required pursuant to the lease. There was a laundry list  
3 of items under which they have defaulted.

4 The landlord back in the early part of 2009 had  
5 served notices to cure. They went in, they tried to get  
6 those *Yellowstones*. The court denied the *Yellowstones*.  
7 There was a termination notice that was served.

8 And then, lo and behold, there was a Civil Court  
9 holdover proceeding in the spring of 2009 --

10 THE COURT: Right, that's the one --

11 MS. DALEY: -- which is different than the one  
12 that I have. It's the one that -- the second one that we  
13 have is in 2010.

14 What the Debtor then did in the civil court was  
15 the Debtor went in and challenged service of the notice of  
16 petition and petition in that civil summary holdover  
17 proceeding and what happened was is that the court found that  
18 the building apparently was vacant, so under the real  
19 property action and proceeding law in the State Court, the  
20 court found that the court did not have jurisdiction because  
21 service of the notice of petition and petition had not been  
22 properly made.

23 After that, or in the interim, there had been some  
24 non-payment cases made, there was drawdown on security  
25 deposit. I got involved in this case, I believe, it was in

1 June of 2009 when we went before Judge Branson because the  
2 Debtor was not providing access to the premises, wasn't doing  
3 what they were supposed to be doing under the terms of the  
4 lease agreement, as well as there were certain submissions to  
5 the Department of Building which contained signatures which  
6 were not that of my client's principal. So, there were issues  
7 of forged documents having been submitted to the Department  
8 of Buildings.

9 At or around the same time, beginning in the early  
10 part of 2009 through the summer months, Debtor had apparently  
11 been negotiating with Urban Outfitters. The Debtor entered  
12 into a sublease, executed a sublease agreement with Urban  
13 Outfitters contrary to the terms of the master lease which  
14 required them to have obtained the landlord's prior written  
15 consent which they did not do.

16 During the course of the litigation from -- and  
17 I'm trying to remember exactly which one it was, but it was  
18 in the spring of 2009 -- they finally came up with this  
19 sublease. Now, this is a landmarked building --

20 THE COURT: Right.

21 MS. DALEY: So, there are lot of things that need  
22 to be done before anything else gets done.

23 THE COURT: Right.

24 MS. DALEY: When my client found out about it, my  
25 client through counsel submitted a letter, I believe it was

1 to the Debtor and Debtor's attorney with a copy to Urban  
2 Outfitters, advising them we never consented to the sublease.  
3 From what we understand, that was the first time that Urban  
4 Outfitters discovered that the landlord was not on board.  
5 And the reason the landlord was not on board was because,  
6 under the terms of that proposed sublease, the lease, the  
7 master lease, needed to be changed, otherwise Urban  
8 Outfitters wouldn't go through with the deal.

9 Under the terms of the Urban Outfitters sublease,  
10 the Debtor also had to come up with a slew of money and had  
11 to do certain work in the premises, which the Debtor also  
12 didn't do.

13 THE COURT: Right, let's --

14 MS. DALEY: And it goes on -- I mean, it goes on  
15 and on. Now, I have a judgment from Judge Owing. I have  
16 orders from Judge Branson. I have certified copies with me  
17 today. And, they were not supposed to stay in possession of  
18 the premises. We have judgments for possession.

19 Judge Branson denied their *Yellowstone*. They  
20 raised these -- you know, all sorts of arguments that they  
21 tried to raise here in State Court.

22 THE COURT: The Debtor commences Chapter 11  
23 proceeding. It's through this party to which you have now  
24 all been invited, and the landlord's made a motion, it's  
25 moved in the alternative --

1 MS. DALEY: And for -- there's a provision at the  
2 end of my application, Your Honor, also for such other and  
3 further relief as the Court --

4 THE COURT: That's exactly where I'm going and I  
5 hear your client's position with respect to my ability to  
6 dispense with State Court process, but there are serious  
7 allegations here and I'm not so sure that your client's right  
8 that I don't have the ability to order the keys to be turned  
9 over and for this to be put to a stop.

10 And I think, Ms. Daley, I think you have to put on  
11 your case. If the Debtor wants to try to convince me that  
12 this was a filing made in good faith with an honest intent to  
13 reorganize and a possibility of reorganizing, then I want to  
14 hear all about who the creditors are, what the other assets  
15 are, what the prospects are. Let's hear it.

16 It's not just, and I've said this in many cases,  
17 it's not "I have a guy, I know a guy, there might be a deal."  
18 That's not good enough and if there are no other assets and  
19 given that there's been an agreement to vacate the stay, you  
20 know, I don't know if that is a concession that there's no  
21 legal right anymore. I suspect that it's not. But there's a  
22 history here and I'm not so sure that I can't fashion an  
23 order that would direct the turnover of the premises and have  
24 that be enforceable.

25 I'm going to keep thinking about that, but I think

1 I can do it and I think that I also could, to the extent that  
2 I keep this case in Chapter 11, I think that I could start a  
3 clock running today for the reimbursement of the landlord's  
4 fees and expenses in continuing to have to litigate this  
5 when, at the end of the day, if what happens -- if you were  
6 to go to State Court, the premises were to be turned over,  
7 then I would think these are fees and expenses that the  
8 landlord need not have incurred.

9           So, I'm just putting that out there as what my  
10 current thinking is, so I think I'm going to have to have an  
11 evidentiary hearing. I have a little case called Amback  
12 that's coming in at 3:00 today, so I don't have an unlimited  
13 amount of time. So, Ms. Daley, you're going to put on your  
14 case, we'll make a record, and then we'll go from there.

15           I may want some further submissions, but I'm just  
16 -- it's not a threat, it's just a statement of what my  
17 current thinking is, that there are -- I'm a firm believer in  
18 there being consequences to one's actions. So, I'm just  
19 putting it out there that there are going to be consequences  
20 to the desire to remain as a Chapter 11 Debtor.

21           If you can convince me that there's a bona fide  
22 Chapter 11 case here, then that's what we'll do, but I want  
23 to hear everything and then I'll make a decision. All right?

24           MR. LEINWAND: That's fine, Your Honor.

25           MS. DALEY: I'm ready to proceed, Your Honor.

1 THE COURT: Okay.

2 MS. DALEY: The first thing I would like to do is  
3 I would like to submit the certified copies of the State  
4 Court --

5 THE COURT: Okay, have you shared them with  
6 counsel?

7 MS. DALEY: I have copies. I know that they had  
8 them but I --

9 THE COURT: Okay.

10 MS. DALEY: -- have copies to provide to them.  
11 Your Honor, how -- I haven't been before Your Honor. You  
12 don't have rules from what I understand, so how do you want  
13 to deal with the exhibits?

14 THE COURT: Why don't you identify the exhibits  
15 that you want to put into evidence and then you can move  
16 their admission and if there are no objections, we'll put  
17 them in the record.

18 MS. DALEY: Fine. Your Honor, the first document  
19 that I would like to move into evidence as the Movant's  
20 Exhibit number 1 is a certified copy of an order and decision  
21 issued by the Supreme Court of the State of New York, County  
22 of New York, in an action entitled "2626 B-way LLC versus  
23 Broadway Metro Associates, LP" with an index number of  
24 106287/09.

25 THE COURT: And what's the date of that order?

1 MS. DALEY: This is January 21st of 2010. It  
2 looks as if it was filed in the Supreme Court Clerk's office  
3 on January 22nd of 2010.

4 THE COURT: Okay, so that's Exhibit 1.

5 MS. DALEY: Now, this action, Your Honor, involved  
6 a lawsuit commenced by the Debtor against the landlord based  
7 upon their claim that the landlord should not have been  
8 entitled to retain a \$525,000 contract deposit.

9 THE COURT: Okay.

10 MS. DALEY: Okay, and in this action, the court  
11 found, and I'm going to reference page 13 of this decision,  
12 under the heading "Plaintiff's 6th Cause of Action" where the  
13 court found that Broadway Metro made no anticipatory or  
14 breach -- or actual breach of the contract. The release of  
15 the money in escrow to Broadway Metro was therefore  
16 appropriate. And this is the original certified copy.

17 THE COURT: Okay, and you're introducing this on  
18 the issue of whether or not there's any remaining security  
19 deposit?

20 MS. DALEY: That, as well as the issue -- it will  
21 also go towards the issue of bad faith.

22 MR. LEINWAND: Ms. Daley, if I may without --  
23 trying to be as civil as I can, I think there's something --  
24 my client has advised me that he will consent to a dismissal  
25 of this Chapter 11 case which I think should resolve the

1 motion, should resolve the issue, and should give you plenty  
2 of time to deal with the case. You've just got to sign.

3 MS. DALEY: Your Honor, I believe that this is  
4 just another one of the Debtor's tactical --

5 THE COURT: What can I do if he wants to dismiss?

6 MS. DALEY: Consenting to dismissal, well -- prior  
7 to granting his application, Your Honor, I would request that  
8 the Court direct him to deliver the keys under my portion of  
9 the application to vacate the stay in an effort to recover  
10 possession of the premises.

11 I would also request that the Court condition any  
12 dismissal upon a provision whereby the Debtor cannot re-file  
13 within a certain time period, where none of his affiliates  
14 which there are eight or ten of them listed on his schedules  
15 as creditors, that --

16 THE COURT: Why do you care if I were to condition  
17 the dismissal on prohibiting a re-filing of this Debtor?  
18 You're a contract counter-party. Why do you need affiliates?

19 MS. DALEY: Because we anticipate that what he'll  
20 do is come in under one of the other entities trying to make  
21 claims against us in some way, shape, or form.

22 THE COURT: Come in here?

23 MS. DALEY: Yes, Judge, or that Mr. Soto, who I  
24 think filed in 2002 -- he may have received his own  
25 individual discharge back in 2002 -- may try to also file.

1 THE COURT: But if I dismiss this Debtor, this  
2 case for this Debtor who's your counter-party and I prohibit  
3 your counter-party from filing for 180 days and then if other  
4 entities come in, I can deal with the other entities when  
5 they come in. I don't think that that would --

6 MS. DALEY: Well, I think, Your Honor, that his  
7 proffer of dismissal, I think, clearly smacks us all in the  
8 face that this filing was in bad faith. I think the Court in  
9 granting --

10 THE COURT: Don't nod at me. I am being played  
11 here big time.

12 MR. LEINWAND: Your Honor --

13 THE COURT: We're going off the record. Everybody  
14 come back here.

15 (Brief recess from 11:46 a.m. to 12:23 p.m.)

16 THE COURT: On the record. Okay, rather than  
17 continue to make a record today and based on certain  
18 representations of counsel that were made on the record  
19 before we broke for an adjournment, we're going to pursue the  
20 vacature of the automatic stay as was offered by the Debtor.

21 Counsel for Broadway Metro Associates is going to  
22 prepare an appropriate order and that order will, among other  
23 things reflect the vacature of the stay for all purposes with  
24 respect to the pursuit of rights and remedies in various  
25 State Court proceedings that are pending involving these

1 parties, will direct that the landlord be given access to the  
2 property whether that takes the form of a set of keys which  
3 is what I would prefer because it is not necessary for the  
4 Debtor to be present. The landlord needs to have access to  
5 the premises as it sees fit.

6 The order will also direct that there be further  
7 briefing submitted on the issue of the scope of this Court's  
8 authority to order immediate surrender of the premises.

9 The motion to dismiss will be adjourned without  
10 date pending these further proceedings. The Court will take  
11 under advisement the issue of whether and to what extent  
12 there will be additional consequences for the failure to pay  
13 the rent as was previously directed by the Court.

14 And subsequent to the completion of the briefing  
15 on the ability to direct surrender of the premises, there  
16 will be an additional date given to you to resume any hearing  
17 that should be necessary.

18 The Office of the U.S. Trustee should be copied on  
19 the drafting of the order. In the event the parties are  
20 unable to agree on the form of order, you can submit  
21 competing orders and the Court will enter what I deem  
22 appropriate. Ms. Daley?

23 MS. DALEY: Your Honor, one additional thought.  
24 Would the Court be inclined to direct a special trustee to be  
25 appointed now pending everything else that's going to be

1 happening? I just thought that in light of the fact that  
2 we've got issues with regard to the building itself, not only  
3 its condition, but the probability of future damage to it, et  
4 cetera, that maybe it wouldn't be a bad idea.

5 THE COURT: Well, the fact that I'm going to give  
6 you access and that I'm going to retain the case and not  
7 dismiss the case gives me some comfort that in the event that  
8 there are issues that you are unable to address you can come  
9 back to me to complain.

10 I'm very reluctant to insert an additional expense  
11 and an additional person in this situation when I've yet to  
12 hear, although based on the papers thus far, I'm not  
13 confident that there are any, let alone substantial, assets  
14 in this case. I would much rather have you -- your client  
15 knows the property best -- have direct access to the  
16 property.

17 And also, to the extent that you can craft  
18 appropriate hold harmless language, I want to be clear that,  
19 to the extent that there have been dangerous conditions  
20 alleged with respect to the premises, they are what they are  
21 and I don't want there to be a liability that is asserted if  
22 somebody gets hurt in there.

23 So, I think we want to put everybody on notice  
24 that there's been allegations that dangerous conditions exist  
25 on the property. I don't know if you want to -- you know, if

1 you have outside people coming in, if you want them to sign  
2 waivers, but I think everybody has to be -- have kind of an  
3 assumption of the risk here with respect to the entry onto  
4 the property.

5 And, by granting you access as the owner of the  
6 premises, you take whatever steps that you deem appropriate  
7 and I'm going to direct the Debtor to cooperate in every  
8 respect in that regard because there's no upside to anybody  
9 getting hurt or the premises becoming further damaged.

10 All right, have I neglected to cover anything?  
11 Somebody wants to tell you something, Ms. Daley.

12 MS. DALEY: Your Honor, my client wanted to know  
13 if he can go into the building and make whatever repairs or  
14 changes for safety purposes --

15 THE COURT: Yes, absolutely. That's what my order  
16 means.

17 MR. LEINWAND: Exactly, Your Honor, and it's  
18 subject of course as Your Honor said to a hold harmless so  
19 that in the event any actions taken by the landlord with  
20 respect to the premises that cause in any manner a detriment  
21 to the value of the premises, we will have the appropriate  
22 hold harmless, because what you're doing, Your Honor, is  
23 permitting an outside source to come into Debtor's property  
24 --

25 THE COURT: It's not the Debtor's property.

1 MR. LEINWAND: To come into property in which the  
2 Debtor is the -- at present --

3 THE COURT: In which the Debtor asserts an  
4 equitable interest.

5 MR. LEINWAND: That's correct, Your Honor. And  
6 subject to the hold harmless, you know, we have no concern  
7 about that, but you know, the wholesale changes I think would  
8 go beyond --

9 THE COURT: The landlord is going to go back to  
10 State Court and continue to attempt to obtain possession.

11 MR. LEINWAND: I understand, Your Honor.

12 THE COURT: Unless I determine -- unless and until  
13 I determine that I can simply direct the turnover of  
14 possession. In the meantime, as the owner of the property  
15 and under my watch, they're going to do whatever they think  
16 is appropriate to safeguard the property.

17 MR. LEINWAND: We have no problem with  
18 safeguarding the property, Your Honor. I think the request  
19 was to do whatever's necessary to -- whatever they want to do  
20 which may constitute structural changes, et cetera, and I  
21 don't think that -- I think that goes beyond the ambit of  
22 what Your Honor is directing at this point in time.

23 I understand that we all want to maintain --

24 THE COURT: Have your client stand up.

25 THE DEBTOR: Yes, ma'am.

1 THE COURT: Good afternoon. Why are we continuing  
2 to have to argue about this issue?

3 THE DEBTOR: I have been involved with this  
4 building for the last four years. I had the fire department  
5 in there a couple of days ago; there was ten firemen that  
6 walked around the building. There was nothing -- there was  
7 no violations issued --

8 THE COURT: All right, if she, if the landlord --

9 THE DEBTOR: If they want to come in and do some  
10 safety whatever, whatever they think --

11 THE COURT: Something for the benefit of the  
12 building.

13 THE DEBTOR: That's no problem, Your Honor.

14 THE COURT: Okay, then the conversation's over.

15 THE DEBTOR: Yeah, I mean, yes, no problem, yes.

16 THE COURT: Because if she does something for the  
17 benefit of the building and somehow at the end of this very  
18 long day you prevail, then that would hypothetically inure to  
19 your benefit, correct?

20 THE DEBTOR: Definitely yes. Yes, Your Honor.

21 THE COURT: So, if it's --

22 THE DEBTOR: Can I ask Your Honor to ask them what  
23 exactly they're going to do? Because I have -- I've been in  
24 that building for four years. It's been around for the last  
25 hundred years. There's nothing --

1 THE COURT: You know what --

2 THE DEBTOR: I just want to know, that's all.

3 THE COURT: You know what? I'm not  
4 landlord/tenant court, all right and I assume the parties are  
5 going to act in a rational, economic fashion.

6 THE DEBTOR: Okay.

7 THE COURT: People don't have extra money to throw  
8 around doing things that don't make sense rationally,  
9 economically. So, you're going to give her access?

10 THE DEBTOR: Yes, and if there's a problem, Your  
11 Honor, with them and us -- I mean, with them and me, okay, as  
12 far as doing things that really, really aren't necessary and  
13 just to spend money and just --

14 THE COURT: It's their money.

15 THE DEBTOR: Okay.

16 THE COURT: It's their money.

17 THE DEBTOR: Okay, yes.

18 MS. DALEY: Just so, Your Honor, with regard to  
19 that tortuous inference, the adversary proceeding --

20 THE COURT: Yes.

21 MS. DALEY: -- we're going to include in the  
22 proposed order a provision that it be remanded and that the  
23 parties can continue in State Court with respect to that.

24 THE COURT: You don't want to keep it here and  
25 just --

1 MS. DALEY: The judge in State Court on the eve of  
2 rendering a decision as to whether or not it should have been  
3 dismissed, pre-answer, was stayed as a result of this  
4 bankruptcy filing.

5 MR. LEINWAND: Your Honor, that has nothing to do  
6 with this hearing. If she wants to -- if landlord wants to  
7 make a motion to remand, they're free to make a motion to  
8 remand. As it stands now, what is before Your Honor has  
9 nothing to do with the modification of the stay motion.  
10 There's no stay relief with respect to that motion. The  
11 motion's with the jurisdiction of this Court, not the State  
12 Court. The State Court has no jurisdiction to decide that  
13 issue unless and until --

14 THE COURT: Let's put that over to the side for  
15 now, Ms. Daley. Let's just focus on the possession of the  
16 property for now.

17 MS. DALEY: I understand, Your Honor.

18 THE COURT: All right.

19 MS. DALEY: It's just an effort so that my client  
20 didn't have to continue spending fees unnecessarily because  
21 they're going to be making a motion to have it remanded.

22 THE COURT: I understand, but let's -- right now,  
23 you don't have to do anything. I have it. Right? Let's see  
24 what happens. Maybe it will have a way of taking care --

25 MS. DALEY: But we have to file an answer, Judge.

1 THE COURT: Get an extension of time. Give her an  
2 extension of time. All right, you can put that in the order  
3 that the time to answer is adjourned for 45 days, pick a  
4 number. All right? I think we're done for today.

5 MR. LEINWAND: Thank you, Your Honor.

6 MS. DALEY: Thank you, Your Honor.

7 (Time noted: 12:33 p.m.)

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10 CERTIFICATE

11 I, RANDEL RAISON, certify that the foregoing is a  
12 correct transcript from the official electronic sound  
13 recording of the proceedings in the above-entitled matter, to  
14 the best of my ability.

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16 \_\_\_\_\_ July 18, 2011

17 Randel Raison

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